RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
OCT 21 2016
OFFICE OF THE CLERK

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to Supreme Court of Kentucky

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS[1]

Pursuant to Rule 15.8, petitioners respectfully submit this supplemental brief to address an additional development since the filing of petitioners' reply brief in September 2016.

On October 4, 2016, the Centers for Medicare & Medicaid Services, a component of the Department of Health and Human Services, promulgated a rule that, if upheld, would prohibit Medicare-participating skilled nursing facilities and Medicaid-participating nursing facilities from entering into new pre-dispute arbitration agreements with residents at their facilities. See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (the "Arbitration Rule").

The Arbitration Rule does not impact the importance of the question presented in this case nor the propriety of this Court's review—including summary reversal or vacatur for reconsideration in light of *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015)—for at least three reasons.

First, the Arbitration Rule applies only prospectively. In adopting the rule, the agency "emphasize[d] that this final rule * * * does not have any effect on existing arbitration agreements or render them unenforceable." 81 Fed. Reg. at 68,800. The rule therefore does not affect the enforceability of the arbitration agreements at issue here, or of the "countless [other preexisting] arbitration agreements" between care facilities and their residents

[1] The Rule 29.6 Statement in the Petition remains accurate.

that have been placed into doubt by the decision below. Pet. Reply 4 (quoting Br. of Am. Health Care Ass'n et al. 6, 7). Indeed, the large number of lower court decisions in Kentucky alone in the short time since the decision below (Pet. 17-19; Pet. Reply 3) provides stark evidence of the large number of contracts potentially affected and the frequency with which the legal issue will arise.

Second, the Arbitration Rule itself may be invalidated. Earlier this week, the American Health Care Association, the Mississippi Health Care Association, and several individual long-term care facilities filed suit challenging the validity of the Arbitration Rule and seeking to enjoin its enforcement. See Complaint, *American Health Care Ass'n* v. *Burwell*, No. 16-cv-233 (N.D. Miss. Oct. 17, 2016), Dkt. No. 1.[2] The plaintiffs contend that the Arbitration Rule violates the FAA, exceeds the agencies' statutory authority under the Medicare and Medicaid Acts, is arbitrary and capricious, and violates the Regulatory Flexibility Act. The Rule therefore may never take effect.

Third, while this case arises in the context of a long-term care facility, the anti-arbitration construction adopted below applies to powers of attorney generally—which can arise in a number of contexts, such as asset or property management, or any other situation in which the principal requires assistance in managing financial or personal transactions.

More broadly, the disregard of this Court's precedents interpreting the Federal Arbitration Act and

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[2] A copy of the complaint is also available on the American Health Care Association's website. See https://www.ahcancal.org/News/news_releases/Documents/CMS%20Arbitration%20Rule%20-%20complaint%20%2810-16-16%29.pdf.

the hostility to arbitration evidenced by the decision below cry out for this Court's intervention no matter the context. It is crucial that state courts faithfully adhere to this Court's precedents. Again, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2016